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No. 06-923

IN THE
Supreme Court of the United States

METLIFE (METROPOLITAN LIFE INSURANCE COMPANY) AND LONG TERM DISABILITY PLAN FOR ASSOCIATES OF SEARS, ROEBUCK AND COMPANY,
Petitioners,

v.

WANDA GLENN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NEW YORK CITY CHAPTER OF THE NATIONAL MULTIPLE SCLEROSIS SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The New York Chapter of the National Multiple Sclerosis Society respectfully submits this brief as *amicus curiae* in support of respondent, with the written consent of the parties.[1]

INTERESTS OF *AMICUS CURIAE*

The New York City Chapter of the National Multiple Sclerosis Society serves the thousands of New Yorkers living with Multiple Sclerosis ("MS") and their families by providing comprehensive support services and educational programs and by funding a national research initiative seeking the cause, treatments and cure for this chronic neurological disease. There are more than 7,000 families in New York City and 400,000 in the United States affected by MS. New York is one of nine states with the highest incidence of MS in the nation.

MS is a chronic, often disabling, disease that attacks the central nervous system, which is made up of the brain, spinal cord and optic nerves. MS can cause blurred vision, loss of balance, poor coordination, slurred speech, tremors, numbness, extreme fatigue, problems with memory and concentration, paralysis, blindness and more. These

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[1] Letters of consent have been filed with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

problems may be permanent or may come and go. The progress, severity and specific symptoms of MS are unpredictable and vary from one person to another.

Thousands of the families affected by MS in New York rely on health and disability insurance benefits provided through employee welfare benefit plans regulated under ERISA. The ability of these families to continue to rely on these benefits is of vital importance. An improper denial of benefits by a conflicted insurance company could mean that an MS patient must forego medically necessary care or be unable to afford even the most basic living expenses.

INTRODUCTION AND SUMMARY

I. Article III of the Constitution grants a federal litigant asserting a "private right" the constitutional right to "an impartial and independent federal adjudication of claims." Consequently, Courts can address the irreconcilable conflict of interest in "ERISA Insurance Cases"[2] only by providing a plenary *de novo* proceeding. To do less, by deferring to the determination of a conflicted insurance company, constitutes an unconstitutional relegation of judicial power to a conflicted insurance company.

II. There is no authority in this Court's constitutional precedent, ERISA or *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), for

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[2] "ERISA Insurance Cases" means a case involving a fully-insured welfare benefit plan governed under ERISA.

denying Mrs. Glenn her constitutional right to an impartial and independent federal adjudication under Article III.

A. Relegation of judicial power to MetLife is constitutionally impermissible. Although this Court has recognized two very narrow exceptions to unfettered Article III adjudication of private rights, neither is applicable to ERISA Insurance Cases. First, a claim for long term disability benefits is a purely "private right," and Congress did not create an Article I Court or tribunal to decide ERISA employee benefit disputes. *See, Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). Second, Mrs. Glenn never waived her right to Article III adjudication. *See, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). Nor was there a constructive waiver when Mrs. Glenn's employer, Sears, Roebuck and Company, agreed to grant discretionary authority to MetLife in the long term disability plan. Constructive waivers of fundamental constitutional rights are not permissible. *See, e.g., College Sav. Bank v. Fla. Prepaid Post-secondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999).

B. Relegation is not authorized under the text of ERISA or by its legislative history. ERISA specifically authorizes participants to commence "civil actions" subject to the jurisdiction of the federal courts. *See, e.g.*, 29 U.S.C. §§1001(b), 1132(a)(1)(B), 1132(f). Early drafts of ERISA considered relegating judicial power to an Article I tribunal, *i.e.*, a grievance or arbitration proceeding

before the Secretary of Labor to resolve disputes. *See* S. Report 93-383, *reprinted in*, 1974 U.S.C.C.A.N. 4890, 4999-5000. The final bill, however, did not contain either of these proposals. The fact that Congress considered and then purposefully rejected an Article I tribunal is conclusive proof that Congress did not intend to limit the Article III rights of claimants. Because ERISA is a comprehensive and reticulated statute, Courts should be reluctant to tamper with its enforcement scheme. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-218 (2002).

C. Relegation is not authorized by *Firestone*. *Firestone* never considered the applicability of Article III. *Firestone* also did not evaluate or consider the significant differences between a fully-insured welfare benefit plan and a fully-funded or unfunded trust. Indeed, *Firestone* specified that its holding applied regardless of whether a plan was "funded or unfunded," but did not specify that it applied to insured plans. 489 U.S. 101 at 109. There are good reasons for treating insured plans differently from funded or unfunded plans. *Firestone* recognized the imperative of not applying a standard of review that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 489 U.S. 101 at 104. But, that is precisely what would happen if deference were granted to conflicted insurance companies. Under traditional insurance law, ambiguities in insurance policies are interpreted <u>against</u> the insurance company under the doctrine of *contra proferentem*, not in their favor

as would happen under a deferential standard of review. 2D Holmes's Appleman on Insurance, §6.1 (1996).

ARGUMENT

I. ARTICLE III OF THE CONSTITUTION REQUIRES A *DE NOVO* PLENARY PROCEEDING WHEN AN ERISA INSURANCE CASE IS DEFENDED BY A CONFLICTED INSURANCE COMPANY

Mrs. Glenn has a constitutional right to have her "private right"[3] to long term disability benefits adjudicated under the "judicial power" of an Article III Court. To protect her constitutional right, a *de novo* plenary proceeding is required. Granting any level of deference to MetLife, a conflicted insurance company, would be a constitutionally impermissible relegation of judicial power.

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[3] *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372, 377-378 (1855) (Distinguishing between "private right" requiring Article III adjudication and the exception for "public rights" which may be resolved by administrative agencies or Article I Courts); Richard H. Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 Harv. L. Rev. 916 (1988) (concluding that meaningful judicial review in an Article III court is a necessary and sufficient requirement under the Constitution).

A. The Constitution Requires the Adjudication of "Private Rights" By An Unfettered Article III Court

Article III of the Constitution not only serves as an inseparable element of the constitutional system of checks and balances, but it also confers a personal right on litigants to have an Article III judge preside over a civil trial. *Peretz v. United States*, 501 U.S. 923, 936 (1991). Article III "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States." *Schor*, 478 U.S. 833 at 850.

This Court has held that Article III restricts Congress from relegating adjudicative functions to non-Article III courts and tribunals when the dispute is over "private" rather than "public" rights. *See, Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989):

> Our prior cases support administrative factfinding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.[4]

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[4] In his concurring opinion, Justice Scalia indicated that he would hold that public rights are only those affecting the government. All other rights are private rights. Justice Scalia

. . .

> ...if a statutory cause of action,...is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking the essential attributes of the judicial power.

Thus, "private rights" must be decided by an impartial and independent Article III court. This means an independent adjudication without deference to one of the parties to that very litigation.

B. ERISA Insurance Benefits Are "Private Rights" Requiring Article III Adjudication

A claim for long term disability benefits from a private insurance company is a quintessential "private right." Prior to the enactment of ERISA, employer-provided long term disability insurance claims were adjudicated under state insurance law. When Congress passed ERISA, however, it effectively "federalized" all private sector employee benefits, including long term disability benefits. In so doing, 29 U.S.C. §1132(a)(1)(B) displaced traditional State causes of action under State

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indicated that he departed with the exceptions described in *Thomas* and *Schor*:

> The notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine. The language of Article III itself, of course, admits of no exceptions. . .

492 U.S. 33 at 66.

insurance laws.[5] *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987)(holding state common law causes of action arising from the improper processing of a claim are preempted under ERISA).

Because Mrs. Glenn's litigation against MetLife arises from a private property dispute that, prior to the passage of ERISA, was historically resolved under State laws, her claim is one that requires Article III resolution. *See, Thomas, 473 U.S.* 568 at 587 ("Most importantly, the statute in *Crowell* displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts . . . ").

II. RELEGATION OF JUDICIAL POWER, IN THE FORM OF DEFERENCE TO A CONFLICTED INSURANCE COMPANY, IS CONSTITUTIONALLY IMPERMISSIBLE

There is no authority in this Court's constitutional precedents, ERISA or *Firestone* for denying Mrs. Glenn her constitutional right to an impartial and independent federal adjudication under Article III.

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[5] State insurance law is not entirely pre-empted. 29 U.S.C. §1144(b)(1) saves certain insurance law from federal preemption in connection with fully-insured ERISA plans.

A. The Two Limited Exceptions Specified In *Thomas* And *Schor* Do Not Authorize The Relegation Of Judicial Power To A Conflicted Insurance Company

There are only two limited instances in which Congress is authorized to relegate adjudicative authority of "private rights" for resolution by a non-Article III court or tribunal. *See, Thomas*, 478 U.S. 568 (1985); *Schor*, 478 U.S. 833 (1986). In enacting ERISA, Congress invoked neither.

In *Thomas*, this Court permitted an Article I arbitration adjudication, subject to judicial review only for fraud, misrepresentation, or other misconduct, because: (1) the right created by the Federal Insecticide, Fungicide, and Rodenticide Act as to the use of a registrant's data was not a purely "private" right, but bore many of the characteristics of a "public" right; (2) the arbitration scheme was necessary as a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health and environmental impact of a potentially dangerous product; and (3) the scheme contained its own sanctions and subjected no unwilling defendant to judicial enforcement power. Given the nature of the right at issue and the concerns motivating Congress, this Court held that the Article I adjudication did not violate Article III. 473 U.S. 568 at 590.

On its face, the *Thomas* exception is inapplicable to ERISA Insurance Cases because Congress did not even create an Article I Court or tribunal (including

a private insurance company) to decide employee benefit disputes arising under ERISA. *See, e.g., Downs v. Liberty Life Ass. Co. of Boston*, 2005 U.S. Dist. LEXIS 22531, *19 (N.D. Tex. 2005)(". . . Congress did not delegate any adjudicative authority to employers or plan administrators when enacting ERISA . . ."); *Black v. UNUMProvident Corp.*, 245 F.Supp.2d 194, 199 (D.Me. 2003)("ERISA does not delegate any adjudicative functions to an otherwise private party."). Thus, there is no *Thomas*-like relegation to an administrative agency or legislative Article I tribunal.

In *Schor*, this Court held that "Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. 833 at 848-849. The *Schor* waiver exception, however, cannot justify deference to a conflicted insurance company because: (1) Congress did not establish a method under which a claimant could waive her Article III rights; and (2) there has been no voluntary, knowing and intelligent waiver by Mrs. Glenn.

First, in *Schor*, Congress specifically established an Article I tribunal under which a claimant could voluntarily assert a claim. 478 U.S. 833 at 855 ("Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties . . ."). ERISA is different. As argued, *supra*, neither the ERISA statute, nor its legislative history, contains any

language establishing an Article I tribunal at the Department of Labor or otherwise. Moreover, the ERISA statute does not contain any language establishing a waiver scheme under which a claimant may voluntarily waive her right to an Article III proceeding in favor of a deferential review.

Second, in *Schor*, there was no dispute that the plaintiff voluntarily waived her right to Article III adjudication by voluntarily filing a counterclaim before the CFTC. Here, no argument can be made that Mrs. Glenn meaningfully waived her Article III rights. Constitutional rights cannot be waived haphazardly, but, rather, only in a voluntarily, knowing and intelligent manner. *See, e.g., Adams v. United States ex rel. McCann,* 317 U.S. 269 (1942) (waiver of right to jury trial). "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *See, e.g., College Sav. Bank*, 527 U.S. 666 at 682.

A waiver cannot be inferred by the mere fact that Mrs. Glenn voluntarily enrolled as a plan participant under the MetLife insurance policy or commenced a lawsuit in federal court. There is no evidence that Mrs. Glenn was provided an opportunity to elect coverage subject to a *de novo* proceeding versus coverage where MetLife's determination would be granted deference. Nor was she provided with a document explaining her constitutional rights afforded under Article III and what the consequence of waiving those rights might be.

Moreover, the fact that Mrs. Glenn's employer might have voluntarily agreed to the inclusion of discretionary language in the plan document of the long term disability plan is insufficient to constitute a meaningful constitutional waiver on the part of Mrs. Glenn. A third-party "constructive waiver" by Mrs. Glenn's employer is far afield from the undisputed waiver in *Schor* and the meaningful waiver required of *Adams,* 317 U.S. 269 at 272-273. As this Court stated in *College Sav. Bank*:

> We think that the constructive-waiver experiment of *Parden* was ill conceived . . .
>
> . . .
>
> Indeed, *Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges. As we said in *Edelman*, "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."

527 U.S. 666 at 680, 682 (citation omitted).

Thus, this Court has clearly enunciated that waiver of a constitutional right, such as to Article III adjudication; must be made affirmatively and in conformity with waivers of other personal constitutional rights. Such a waiver cannot be made by implication or construction. *Id.*

B. The Text And Legislative History Of ERISA Do Not Authorize A Relegation Of Judicial Power To A Conflicted Insurance Company

Not only did Congress decide not to create a *Thomas*-like regulatory scheme or a *Schor*-like waiver scheme, Congress explicitly created a regulatory scheme that grants ERISA participants and beneficiaries full and unimpeded access to the federal courts. 29 U.S.C. §1001(b) declares that it is the policy of the statute to protect the interests of participants and their beneficiaries "by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1132(a)(1)(B) grants participants and beneficiaries the right to commence a "civil action" and provides no limitation on the procedural protections conferred by the Federal Rules of Civil Procedure. 29 U.S.C §1132(f) provides that "the district courts shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties." 29 U.S.C §1132(e)(2) then makes it easy for participants and beneficiaries to file a civil action by creating one of the most liberal venue provisions in federal law. An action may be brought "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found."

Indeed, in early drafts of ERISA, Congress considered creating an Article I tribunal, *i.e.*, a grievance or arbitration proceeding before the Secretary of Labor,[6] to resolve disputes. The final

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[6] *See* S. Report 93-383, *reprinted in*, 1974 U.S.C.C.A.N. 4890, 4999-5000 ("the opportunity to resolve any controversy

bill, however, did not contain either of these proposals. Rather, it unambiguously provides for a private right of action in the District Courts. (29 U.S.C. §1132(f)). The fact that Congress considered and then purposefully rejected an Article I tribunal is conclusive proof that Congress did not intend to limit the Article III rights of claimants.

Because the text of ERISA is clear, the courts are not free to create a different regime when Congress chose not to. *See, American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("'[O]ur starting point must be the language employed by Congress,' and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'") (internal citations omitted). This Court has repeatedly described ERISA as a "comprehensive and reticulated statute," "the product of a decade of congressional study of the Nation's private employee benefit system." *See, e.g., Great-West*, 534 U.S. 204 at 209. Courts, therefore, should be very reluctant to create a non-Article III Court or tribunal that Congress did not expressly authorize. Plainly, if Congress wanted the Courts to relegate judicial power to a conflicted insurance company, it would have said so.

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over [ ] retirement benefits under qualified plans in an inexpensive and expeditious manner . . . Accordingly, the committee has decided to provide that controversies as to retirement benefits are to be heard by the Department of Labor.").

C. *Firestone* Does Not Authorize The Relegation Of Judicial Power To A Conflicted Insurance Company

The relegation of judicial power to MetLife is not authorized by *Firestone*.[7] *Firestone* never considered the applicability of Article III. Moreover, *Firestone* did not evaluate or consider the significant differences between a fully insured welfare benefit plan and a fully funded or unfunded trust. Rather, the three plans litigated before the Court were: (1) an unfunded termination pay plan; (2) an unfunded stock purchase plan; and (3) an unfunded pension plan. *Firestone* specified that its holding applied regardless of whether a plan was "funded or unfunded," *Id.* at 109, but did not specify that it applied to insured plans.

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[7] This Court held the appropriate standard of review was *de novo*, but then, in *dicta*, stated:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.*

489 U.S. 101 at 109 (emphasis added). The quoted language is *dicta* because none of the plans at issue in the *Firestone* case had language granting the plan administrator or fiduciary discretionary authority. The language is, therefore, not necessary to the holding. Seizing on this *dicta*, insurance companies have readily amended their policies to include grants of discretionary authority, making the vast majority of welfare benefit claims subject to the arbitrary and capricious standard of review.

There are good reasons for treating insured plans differently from funded or unfunded plans. *Firestone* recognized the imperative of not applying a standard of review that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." 489 U.S. 101 at 114. Granting deference to a conflicted insurance company, however, undermines the protection of employees for the benefit of an insurance company. Historically, insurance claims have always been treated as *de novo* plenary proceedings in Court. Certainly, Congress did not intend for ERISA to make it easier for insurance companies to deny benefits to private sector employees.

Moreover, insurance cases have always been treated as breach of contract cases and have not been subject to concepts of trust law. Granting deference to a conflicted insurance company creates a total reversal of the traditional presumptions in insurance cases. Under traditional insurance law, ambiguities in insurance policies are interpreted against the insurance company under the doctrine of *contra proferentem*, not in their favor as happens under a deferential standard of review.

Since *Firestone*, the case for granting deference to a conflicted insurance company has become even more attenuated. This Court has questioned the efficacy of a deferential standard when there is a conflict of interest (as in the case of an insurance company, like MetLife, that serves as both decider and payor of benefits). *See, Rush Prudential HMO,*

Inc. v. Moran, 536 U.S. 355, 384 n.15 (2002) ("It is a fair question just how deferential the review can be when the judicial eye is peeled for conflict of interest.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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